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BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA  
\* \* \* \* \*

IN THE MATTER OF APPLICATION TO CHANGE A ) PROPOSAL  
WATER RIGHT NO. 40M-30005660 BY J. HARRY ) FOR  
TAYLOR II AND JACQUELINE R. TAYLOR ) DECISION

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6 \* \* \* \* \*

7 Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont.  
8 Code Ann.) and to the contested case provisions of the Montana  
9 Administrative Procedure Act, and after notice required by Mont. Code  
10 Ann. § 85-2-307, a hearing was held on September 8, 2004 in Malta,  
11 Montana to determine whether an authorization to change Water Right  
12 Claim Nos. 40M-182841-00 and 40M-007667-00 should be issued to J.  
13 Harry Taylor II and Jacqueline R. Taylor, hereinafter referred to as  
14 "Applicant" for the above application, under the criteria set forth in  
15 Mont. Code Ann. § 85-2-402(2).

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APPEARANCES

Applicant appeared at the hearing by and through counsel, Stephen  
R. Brown, Jr. J. Harry Taylor II, John Jr. (Jay) Yeska, Mike Kaiser,  
Audie Simpson, Mike Lang, and Randy Taylor testified for the  
Applicant.

Objector Colleen K. Barnard appeared at the hearing in her own  
behalf.

Denise Biggar, Water Resources Specialist, Department of Natural  
Resources and Conservation, testified at the request of the Hearing  
Examiner.

**EXHIBITS**

Applicant offered and the Hearing Examiner accepted and admitted into evidence, Applicant's Exhibits A-1, A-2, A-3, A-5, A-8, A-9, A-10, and A-11.

**Applicant's Exhibit A-1** is a copy of Application to Change a Water Right (Application No. 30005660-40M).

**Applicant's Exhibit A-2** is a copy of the general abstract for Water Right Number 40M-182841-00.

**Applicant's Exhibit A-3** is a copy of the general abstract for Water Right Number 40M-169656-00.

**Applicant's Exhibit A-5** is a copy of the "Notice Area" form prepared for Application No. 30005660 by Denise Biggar.

**Applicant's Exhibit A-8** is a facsimile coversheet from Northern Ag Service, a pump data sheet, a pivot or lateral sprinkler package data form, and a diagram for a pivot system.

**Applicant's Exhibit A-9** is a copy of a map created by the Department of Natural Resources and Conservation (DNRC) for Change Application No. 40M-30005660 showing acres removed from irrigation and the old pump site.

**Applicant's Exhibit A-10** is a copy of a map created by the DNRC for Change Application No. 40M-30005660 showing the proposed place of use and point of diversion (new pump site).



1 Natural Resources and Conservation (Department) on March 25, 2003.

2 (Department file)

3 2. Jacqueline R. Taylor is also an owner of record of the water  
4 rights affected by the proposed change. (*Prehearing Order #2*, August  
5 25, 2004, Department file)

6 3. The Environmental Assessment (EA) prepared by the Department for  
7 this application was reviewed and is included in the record of this  
8 proceeding. (Department file)

9 4. Applicant proposes to change one point of diversion for water  
10 right claim number 40M-182841-00 from Beaver Creek, at a point in the  
11 the SENWSE of Section 6, T31N, R33E, Phillips County, to Beaver Creek,  
12 at a point in the SWSWSW of Section 14, T31N, R34E, Valley County. The  
13 new point of diversion is approximately 23 stream miles downstream on  
14 Beaver Creek. (Department file)

15 5. Applicant proposes to change the place of use for portions of two  
16 water rights: water right claim numbers 40M-182841-00 and 40M-7667-  
17 00. Applicant proposes to remove from irrigation a total of 128 acres  
18 in the following locations in Section 6, Township 31 North, Range 33  
19 East, Phillips County: 10 acres in the S $\frac{1}{2}$ , SW $\frac{1}{4}$ , NE $\frac{1}{4}$ ; 32 acres in the  
20 W $\frac{1}{2}$ SE $\frac{1}{4}$ ; 19 acres in the S $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ ; and 67 acres in the E $\frac{1}{2}$ SW $\frac{1}{4}$ . Applicant  
21 proposes to irrigate in their place another 128 acres in the SW $\frac{1}{4}$  OF  
22 Section 14, Township 31 North, Range 34 East, Valley County.  
23 (Department file)

1    **Historic Water Use**

2    6.    I find that Applicant has historically diverted 3,000 gallons per  
3    minute (gpm) from the old point of diversion to irrigate approximately  
4    125 acres from April through the end of September. The Applicant used  
5    a 16-inch Crisafulli pump with a claimed capacity at purchase of up to  
6    9,000 gpm. Applicant irrigated 46 acres of bluejoint western wheat  
7    grass and 79 acres of spring wheat. (Testimony of J. Harry Taylor II)

8  
9    **Adverse Effect**

10   7.    I find that there are other water rights that could potentially  
11   be adversely affected by the proposed change. The Department  
12   identified 25 water rights of other appropriators in the area of  
13   adverse impact. (Department file) Although J. Harry Taylor II  
14   testified that not all of the identified water rights are being used  
15   and approximately five of the water right owners were using water from  
16   Beaver Creek, Applicant did not provide details about which of these  
17   water rights were being used (or not used) and in what amounts.  
18   (Testimony of J. Harry Taylor II).

19   8.    Objector Barnard has a water right that could potentially be  
20   affected by the proposed change.

21        Objector Barnard has irrigated from Beaver Creek. She used to  
22   pump water from Beaver Creek into the slough system. Currently she  
23   pumps water out of Beaver Creek with a 5,280 gpm Crisafulli pump.  
24   Objector Barnard did not irrigate from Beaver Creek in every year.  
25   Objector Barnard testified that she did not irrigate from Beaver Creek

1 in some years due to inadequate water and a belief that her hired  
2 staff was irrigating from Beaver Creek. Objector Barnard did not show  
3 why, and I cannot find that, she would be adversely affected by  
4 Applicant's proposed change. Objector Barnard testified that J. Harry  
5 Taylor II was pumping at the old and new points of diversion and also  
6 explained that the point of diversion may have been moved from above  
7 Robinson dam to below Robinson dam. Objector Barnard also testified  
8 that the first year that she was unable to use her water rights was in  
9 2001. (Testimony of Colleen Barnard, Jay Yeska) Because the proposed  
10 change was implemented after 2001, I find that some other factor  
11 affected the use of Objector Barnard's water right in 2001.

12 9. There is conflicting evidence about the amount of water available  
13 and there are no water measurements in the record. Testimony by the  
14 Applicant that there is an overabundance of water is not compelling in  
15 light of testimony to the contrary and without flow measurements.  
16 Applicant argued that there is an overabundance of water. Applicant  
17 has implemented the proposed change for two irrigation seasons - 2003  
18 and 2004 - without first receiving a change authorization from the  
19 Department. J. Harry Taylor II has observed that 4 culverts in a  
20 crossing about 10 miles from Nelson Reservoir do not handle all of the  
21 water from June 1 to the time when the ditch is shut off from Nelson  
22 Reservoir. The culverts are 30-32 inches. Taylor testified there is so  
23 much water that 1 to 4 feet of water flows over the crossing instead  
24 of through the culverts. (Testimony of J. Harry Taylor II)

1 In one year Beaver Creek was so low that cattle could walk across  
2 the stream at a point upstream and adjacent to Applicant's sprinklers.  
3 (Testimony of Jay Yeska) At times, Objector Barnard has been unable to  
4 obtain enough water to operate her pump. Objector Barnard's pump has  
5 a capacity of 5,280 gpm. (Testimony of Colleen Barnard)

6 10. Return flows from the old point of diversion and place of use  
7 were used for irrigation downstream. (Testimony of Jay Yeska) The  
8 proposed diversion works will result in no waste water, if it is  
9 operated properly. Sprinkler irrigation results in less waste water  
10 than flood irrigation. (Testimony of Mike Lang) There is no analysis  
11 in the record that compares historic consumptive use with consumptive  
12 use under the proposed change. The soil in the new place of use is  
13 better for growing crops. (Testimony of Mike Lang and J. Harry Taylor  
14 II).

15 11. I do not find, by a preponderance of the evidence, that the  
16 proposed change will not adversely affect the use of the existing  
17 water rights of other persons. Applicant did not provide an analysis  
18 showing the proposed change would not adversely affect all other water  
19 rights on the source within the area of potential adverse effect.

20 **Adequacy of Appropriation Works**

21 12. I find that the proposed means of diversion, construction, and  
22 operation of the appropriation works are adequate. The Applicant is  
23 using a sprinkler system designed by Northern Ag Service of Malta,  
24 Montana. The Applicant provided a pump data sheet that included a

1 pump curve and a sprinkler data sheet for the pivot. (Exhibit A-8,  
2 Department file, testimony of Mike Lang])

3 **Beneficial Use**

4 13. I find the proposed use of water is beneficial to the  
5 appropriator. Applicant proposes to irrigate 128 acres; half of the  
6 acres irrigated are used to grow spring wheat; the other acres are  
7 used to grow alfalfa. The change in place of use is beneficial to the  
8 applicant because the soil in the new place of use is more productive.  
9 (Testimony of Mike Lang and J. Harry Taylor II)

10 14. I find the volume of water proposed to be diverted is greater  
11 than the reasonable amount necessary to accomplish the proposed use  
12 without waste. I find that 330.24 acre-feet per year is the reasonable  
13 amount necessary to accomplish the proposed use without waste. I hereby  
14 notify the parties that I take official notice of tables derived from  
15 the Natural Resources Conservation Service *Irrigation Guide for*  
16 *Montana*. These tables are used by Department staff to determine crop  
17 requirements for water and contain generally recognized technical or  
18 scientific facts within the Department's specialized knowledge. The  
19 volume of water proposed (337.5 acre-feet per year) is greater than  
20 the amount (330.24 acre-feet per year) recommended by the *Irrigation*  
21 *Guide for Montana* for Climatic Area II. The recommended amount was  
22 calculated using the assumption that alfalfa is grown on 64 acres and

1 spring wheat is grown on 64 acres.<sup>1</sup> The proposed irrigation system  
2 entails the use of gypsum blocks to monitor water availability in the  
3 soil. Mr. Mike Lang is a certified crop advisor who designed the  
4 system. Mr. Lang testified that, if the system is operated properly,  
5 there will be no waste water. (Testimony of Mike Lang)

6 **Possessory Interest**

7 15. I find Applicant has a possessory interest, or the written  
8 consent of the person with the possessory interest, in the property  
9 where the water is to be put to beneficial use. (Department file)

10 **Salvaged Water**

11 16. Applicant did not apply to salvage water. (Department file)

12 **Water Quality**

13 17. No valid objections related to adverse effect on the water  
14 quality of an appropriator were received by the Department.  
15 (Department file)

16 18. No valid objections related to the ability of a discharge  
17 permitholder to satisfy effluent limitations of a permit were received  
18 by the Department. (Department file)

19 Based upon the foregoing Findings of Fact and upon the record in  
20 this matter, the Hearing Examiner makes the following:

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<sup>1</sup> 2.07 acre-feet/acre X 64 acres of grain + 3.09 acre-feet/acre x 64 acres of alfalfa = 330.24 acre-feet.

CONCLUSIONS OF LAW

1  
2 1. The Department has jurisdiction to approve a change in  
3 appropriation right if the appropriator meets the requirements of  
4 Mont. Code Ann. § 85-2-402.

5 2. The Department shall approve a change in appropriation right if  
6 the appropriator proves by a preponderance of evidence the proposed  
7 change in appropriation right will not adversely affect the use of the  
8 existing water rights of other persons or other perfected or planned  
9 uses or developments for which a permit or certificate has been issued  
10 or for which a state water reservation has been issued; except for a  
11 lease authorization pursuant to Mont. Code Ann. § 85-2-436, a  
12 temporary change authorization for instream use to benefit the fishery  
13 resource pursuant to Mont. Code Ann. § 85-2-408, or water use pursuant  
14 to Mont. Code Ann. § 85-2-439 when authorization does not require  
15 appropriation works, the proposed means of diversion, construction and  
16 operation of the appropriation works are adequate; the proposed use of  
17 water is a beneficial use; except for a lease authorization pursuant  
18 to Mont. Code Ann. § 85-2-436 or a temporary change authorization  
19 pursuant to Mont. Code Ann. § 85-2-408 or Mont. Code Ann. § 85-2-439  
20 for instream flow to benefit the fishery resource, the applicant has a  
21 possessory interest, or the written consent of the person with the  
22 possessory interest, in the property where the water is to be put to  
23 beneficial use; if the change in appropriation right involves salvaged  
24 water, the proposed water-saving methods will salvage at least the

1 amount of water asserted by the applicant; and, if raised in a valid  
2 objection, the water quality of a prior appropriator will not be  
3 adversely affected; and the ability of a discharge permitholder to  
4 satisfy effluent limitations of a permit will not be adversely  
5 affected. Mont. Code Ann. §§ 85-2-402(2)(a) through (g).

6 3. The Applicant has not proven by a preponderance of evidence that  
7 the use of existing water rights of other persons or other perfected  
8 or planned uses or developments for which a permit or certificate has  
9 been issued or for which a state water reservation has been issued  
10 will not be adversely affected. (Mont. Code Ann. §§ 85-2-402(2)(a))

11 In a change proceeding, it must be emphasized that other  
12 appropriators have a vested right to have the stream conditions  
13 maintained substantially as they existed at the time of their  
14 appropriations. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96  
15 P. 727 (1908); Robert E. Beck, 2 Waters and Water Rights, § 14.04(c)  
16 (1991 ed., 2001 repl. vol.); W. Hutchins, Selected Problems in the  
17 Law of Water Rights in the West 378 (1942).

18 Montana's change statute simply codifies western water law. One  
19 commentator describes the general requirements in change proceedings  
20 as follows:

21 Perhaps the most common issue in a reallocation dispute is whether other  
22 appropriators, especially junior appropriators, will be injured because of an  
23 increase in the consumptive use of water. Consumptive use has been defined as  
24 "diversions less returns, the difference being the amount of water physically  
25 removed (depleted) from the stream through evapotranspiration by irrigated  
26 crops or consumed by industrial processes, manufacturing, power generation or  
27 municipal use." An appropriator may not increase, through reallocation or  
28 otherwise, the historic *consumptive* use of water to the injury of other

appropriators. *In general, any act that increases the quantity of water taken from and not returned to the source of supply constitutes an increase in historic consumptive use.* As a limitation on the right of reallocation, historic consumptive use is an application of the principle that appropriators have a vested right to the continuation of stream conditions as they existed at the time of their initial appropriations.

Robert E. Beck, 2 Water and Water Rights, supra, at § 14.04(c)(1)

In Pueblo West Metropolitan District v. Southeastern Colorado Water Conservancy District, 717 P.2d 955 (Colo. 1986), the court held:

[O]nce an appropriator exercises his or her privilege to change a water right ... the appropriator runs a real risk of *requantification of the water right based on actual historical consumptive use.*

(italics added).

The requirements of Montana's change statute have been litigated and upheld in In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991) (applicant for a change of appropriation has the burden of proof at all stages before the Department and courts, and the applicant failed to meet the burden of proving that the change would not adversely affect objectors' rights; the application was properly denied because the evidence in the record did not sustain a conclusion of no adverse effect and because it could not be concluded from the record that the means of diversion and operation were adequate).

Prior to the enactment of the Water Use Act in 1973 and the promulgation of Mont. Code Ann. § 85-2-402, the burden of proof in a change lawsuit was on the person claiming the change adversely affected their water right, although the law was the same in that an

1 adverse effect to another appropriator was not allowed. Thompson v.  
2 Harvey, 164 Mont. 133, 519 P.2d 963 (1974) (plaintiff could not change  
3 his diversion to a point upstream of the defendants because of the  
4 injury resulting to the defendants); Head v. Hale, 38 Mont. 302, 100  
5 P. 222 (1909) (successors of the appropriator of water appropriated for  
6 placer mining purposes cannot so change its use as to deprive lower  
7 appropriators of their rights, already acquired, in the use of it for  
8 irrigating purposes); Gassert v. Noyes, 18 Mont. 216, 44 P. 959  
9 (1896) (after the defendant used his water right for placer mining  
10 purposes the water was turned into a gulch, whereupon the plaintiff  
11 appropriated it for irrigation purposes; the defendant then changed  
12 the place of use of his water right, resulting in the water no longer  
13 being returned to the gulch - such change in place of use was unlawful  
14 because it absolutely deprived the plaintiff of his subsequent right).

15 In a change proceeding, the *consumptive* use of the historical  
16 right has to be determined:

17 Expected consumptive use after a reallocation may not exceed historic  
18 consumptive use if, as would typically be the case, other appropriators would be  
19 harmed. Accordingly, if an increase in consumptive use is expected, the quantity  
20 or flow rate of the reallocated water is decreased so that actual historic  
21 consumptive use is not increased.

22  
23 2 Water and Water Rights, supra, at § 14.04(c)(1)  
24

25 In this matter, Applicant has not met Applicant's initial burden  
26 to show that the use of existing water rights will not be adversely  
27 affected. Applicant did not analyze the effect of the proposed change  
28 on water rights in the area of potential adverse effect. Applicant

1 did not show that the consumptive use of water would not increase  
2 under the proposed change. In theory, decreases in the amount of  
3 return flow may cause adverse effect to existing appropriators  
4 downstream of where the return flow historically entered the stream.  
5 See *In the Matter of the Application for Change of Appropriation Water*  
6 *Right G(W)024095-76L* by Walter J. and Patricia L. Vermedahl. See  
7 Findings of Fact Nos. 7, 9, 10, and 11.

8 Objector Barnard did not prove that her water right was adversely  
9 affected. See Finding of Fact No. 8. However, the burden is on the  
10 applicant to prove that the proposed change "will not adversely affect  
11 the use of the existing water rights of other persons or other  
12 perfected or planned uses or developments for which a permit or  
13 certificate has been issued or for which a state water reservation has  
14 been issued under part 3." (Mont. Code Ann. §§ 85-2-402(2)(a)) The  
15 Applicant did not make a *prima facie* case that the use of existing  
16 water rights would not be adversely affected. Furthermore, the  
17 Applicant is required to prove this criterion for all water rights  
18 that could be adversely affected, not just the Objector's water right.

19 4. The Applicant has proven by a preponderance of evidence that the  
20 proposed means of diversion, construction, and operation of the  
21 appropriation works are adequate. Mont. Code Ann. § 85-2-402(2)(b).  
22 See Finding of Fact No. 12.

23 5. The Applicant has not proven by a preponderance of evidence that  
24 the quantity of water proposed to be used is the reasonable amount, or

1 the minimum amount, necessary for the proposed beneficial use.  
2 Diversion of water to anything but a beneficial use is a waste of  
3 water that is prohibited by law. Mont. Code Ann. §§ 85-2-102(2)(a),  
4 85-2-102(19), 85-2-114, and 85-2-301. See Finding of Fact No. 14.

5 However, the Department may approve a change, subject to a  
6 condition that it considers necessary to satisfy the criteria of Mont.  
7 Code Ann. § 85-2-402. Mont. Code Ann. §§ 85-2-102(2)(a) Furthermore,  
8 the Hearing Examiner may take notice of generally recognized technical  
9 or scientific facts within the Department's specialized knowledge.  
10 (Mont Admin. Rule 36.12.221(4))

11 This criterion will be satisfied if the Applicant is authorized  
12 to divert no more than 330.24 acre-feet per year. See Finding of Fact  
13 No. 14.

14 6. The Applicant has proven by a preponderance of evidence the  
15 proposed use of water is a beneficial use of water. Mont. Code Ann. §  
16 85-2-402(2)(c)]. See Finding of Fact No. 13.

17 7. The Applicant has proven by a preponderance of evidence a  
18 possessory interest in the property where water is to be put to  
19 beneficial use. Mont. Code Ann. § 85-2-402(2)(d). See Finding of Fact  
20 No. 15.

21 8. The application does not involve salvaged water. Mont. Code Ann.  
22 § 85-2-402(2)(e). See Finding of Fact No. 16.

1 9. The criteria in Mont. Code Ann. § 85-2-402(2)(f),(g) do not apply  
2 because no valid objections were received. Mont. Code Ann. § 85-2-  
3 402(3). See Finding of Fact Nos. 17 and 18.

4 10. The Department may not grant an authorization to change a water  
5 right unless the Applicant proves all of the applicable Mont. Code  
6 Ann. § 85-2-402 criteria by a preponderance of the evidence. Applicant  
7 has not proven that all of the applicable criteria have been met. See  
8 Conclusion of Law No. 3. Mont. Code Ann. §§ 85-2-402(2).

9 **WHEREFORE**, based upon the foregoing Findings of Fact and  
10 Conclusions of Law, the Hearing Examiner makes the following:

11 **PROPOSED ORDER**

12 Application To Change A Water Right No. 40M-30005660 is hereby  
13 **DENIED**.

14 **NOTICE**

15 This Proposal for Decision may be adopted as the Department's  
16 final decision unless timely exceptions are filed as described below.  
17 Any party adversely affected by this Proposal for Decision may file  
18 exceptions and a supporting brief with the Hearing Examiner. The  
19 party may also request an oral argument hearing before the final  
20 decision maker. Exceptions, briefs, and requests for oral argument  
21 must be filed with the Department or postmarked by November 8, 2004.  
22 Copies must be mailed to all parties by the same date.

23 Parties may file responses and response briefs to any exception  
24 filed by another party. The responses and response briefs must be

1 filed with the Department or postmarked by November 29, 2004. Copies  
2 must be mailed to all parties by the same date.

3 No new evidence will be considered.

4 No final decision shall be made until after the expiration of the  
5 above time periods, and due consideration of timely oral argument  
6 requests, exceptions, responses, and briefs.

7 Dated this 18th day of October, 2004.  
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11

12 Mary Vandebosch  
13 Hearing Examiner  
14 Department of Natural Resources  
15 and Conservation  
16 Water Resources Division  
17 PO Box 201601  
18 Helena, Montana 59620-1601  
19

BEFORE THE DEPARTMENT OF  
NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA  
\* \* \* \* \*

IN THE MATTER OF APPLICATION TO CHANGE A )  
WATER RIGHT NO. 40M-30005660 BY J. HARRY )  
TAYLOR II AND JACQUELINE R. TAYLOR )

FINAL ORDER

\* \* \* \* \*

BACKGROUND

The proposal for decision in this matter was entered on October 18, 2004. The proposal for decision recommended that the application to change a water right be denied. The Applicant filed timely written exceptions. Objector Barnard filed a timely response to Applicant's exceptions. None of the parties requested an oral argument hearing.

STANDARDS OF REVIEW

Pursuant to Mont. Code Ann. § 2-4-621, the Department of Natural Resources and Conservation (Department) may, in its final order:

reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Furthermore, only factual information or evidence that is a part of the contested case hearing record shall be considered in the final decision making process. (ARM 36.12.229(2))

The Department has considered the exceptions and reviewed the record under these standards. The record in this matter was closed at the end of the hearing and no new evidence submitted by parties was considered in reaching this decision.

DISCUSSION

Several key issues are addressed repeatedly in Applicant's exceptions. These issues are addressed first, followed by specific exceptions that have not been addressed generally.

### **Burden of Proof**

Applicant argues, in several places, that there is no evidence to prove that the use of other water rights would be adversely affected. In the exception to Finding of Fact No. 11, Applicant argues that the complete area of potential adverse effect was never determined by either the Department or the objector. Applicant further argues that the Hearing Examiner has placed an impossible burden on the applicant in that he has to prove a negative and the appellant has to foresee the area of potential adverse effect.

The criteria and Applicant's burden to prove the criteria are statutory. (Mont. Code Ann. § 85-2-402) The applicant for a change of appropriation right has the burden as to the nonexistence of adverse effect. (See In re Application for Change of Appropriation of Water Rights for Royston, 249 Mont. 425, 816 P.2d 1054 (1991)).

### **Effect of Objections**

Applicant argues that no one objected to the proposed change. Colleen Barnard filed a valid objection to the proposed change. (Department file) More importantly, the burden of proof is on the applicant to prove that the criteria in 85-2-402 have been met, regardless of whether or not there are objections to the application. (See Mont. Code Ann. §85-2-402(2); ARM 36.12.208; In the Matter of the Application for Beneficial Water Use Permit 93433-76H by Homer D. and Loretta L. Martin, Proposal for Decision (1997); In the Matter of the Application for Beneficial Water Use Permit 83286-41H by Frederick C. and Betsy B. Fehsenfeld, Proposal for Decision (1997).)

### **Determination of Adverse Effect**

Applicant argues that less water would be "used" if the proposed change were authorized, thus having no adverse effect on other appropriators. Conclusion of Law No. 3 in the Proposal for Decision sets forth the law that applies to a determination of adverse effect. It is clear from this review of the law that consumptive use after a change may not exceed historic consumptive use. Conclusion of Law No. 3 cites Beck (Robert E. Beck, 2 Waters and Water Rights, at §

14.04(c)(1)), who identifies the elements that must be considered in a determination of consumptive use. The Applicant mentions diversions and evaporation from ditches, but does not consider return flows or consumption by irrigated crops. The Hearing Examiner correctly found that there is no analysis in the record that compares historic consumptive use with consumptive use under the proposed change. (See Finding of Fact No. 10.)

Furthermore, the Applicant did not prove that moving the point of diversion would not adversely affect the use of other water rights. Return flows from the old point of diversion and place of use were used for irrigation downstream. (Finding of Fact No. 10) The new point of diversion is approximately 23 stream miles downstream from the old point of diversion. (Finding of Fact No. 4) Applicant did not prove that changing the point of diversion and place of use would not adversely affect other water users who have used the return flows for irrigation downstream. A change may not be authorized where decreases in the amount of return flow cause adverse effect to existing appropriators downstream of where the return flow historically entered the stream. (See Gassert v. Noyes, 18 Mont. 216, 44 P. 959 (1896) and In The Matter Of Application To Change A Water Right No. 41I 30002512 By Brewer Land Co, LLC, Proposal for Decision (2003).)

#### **Applicant's Exceptions to Finding of Fact No. 7**

Applicant argues there was no evidence from which to find that other water rights could be adversely affected by the proposed change. The Hearing Examiner found that "there are other water rights that could potentially be adversely affected by the proposed change." (emphasis added) The Hearing Examiner did not find that other water rights were adversely affected by the proposed change. Finding of Fact No. 7 is supported by evidence that is described in Findings of Fact Nos. 7-10.

Applicant argues that testimony from J. Harry Taylor II and Jay Yeska established that the proposed change did not impact other irrigators. The Hearing Examiner considered the testimony of Taylor and Yeska but found that the Applicant did not provide an analysis

showing that the proposed change would not adversely affect all other water rights on the source within the area of potential adverse effect. The Hearing Examiner concluded that the Applicant did not make a *prima facie* case that the use of existing water rights would not be adversely affected. (See Findings of Fact Nos. 7, 9, 10, and 11 and Conclusion of Law No. 3) Mr. Yeska is just one water right holder. The Department must determine whether or not the Applicant has proven that the proposed change will not adversely affect the use of all existing water rights of other persons, not just the water rights that belong to irrigators or to persons who participate in the hearing. (See Mont. Code Ann. § 85-2-402(2)(a))

Finding of Fact No. 7 is supported by the record and will not be changed.

#### **Applicant's Exceptions to Finding of Fact No. 9**

Applicant argues that there is no evidence that there would not be sufficient water available to allow the applicant to successfully change his point of diversion and place of use. The finding does not address the ability of the applicant to successfully change the point of diversion and place of use. The finding is under the heading of "adverse effect."

Applicant's arguments regarding adverse effect have already been addressed.

Applicant argues that the testimony established that the time when cattle could walk across the stream because of a lack of water happened after the irrigation year was over, and in fact happened in late October or early November of the year in question. The record does not support this claim. A review of the audio recording of the hearing shows that neither J. Harry Taylor II or Randy Taylor testified about the timing of the event referenced. The Hearing Examiner considered J. Harry Taylor II's conflicting testimony. (See Finding of Fact No. 9.) Jay Yeska testified that this event occurred in September or October. J. Harry Taylor II testified that he irrigated through the end of September. (See Finding of Fact No. 6.)

Finding of Fact No. 9 is supported by the record and will not be changed.

**Applicant's Exception to Finding of Fact No. 10**

Applicant argues that no exceptional waste will occur which would adversely affect other appropriators. The Hearing Examiner did not find that waste of water would have an adverse effect on other appropriators if the proposed change were authorized. The Hearing Examiner found that the proposed diversion works will result in no waste water, if it is operated properly. (See Finding of Fact No. 10) Finding of Fact No. 10 is supported by the record and will not be changed.

**Applicant's Exceptions to Finding of Fact No. 11**

Applicant argues that there was no evidence whatsoever that the proposed change would adversely affect the use of existing water rights of other persons and that the finding is speculation.

The burden of proof has already been addressed. The Hearing Examiner found that she could not make the finding necessary to prove the criterion at issue. She did not make a finding; therefore, her finding cannot be speculation.

Applicant argues that the complete area of potential adverse effect was never determined by either the Department or the objector. Although the burden is not on the Department or the objector, I note that the Department did identify an area of possible adverse effect for public notice purposes. (See Applicant's Exhibit A-5 and the Department's file.) Applicant offered this information as an exhibit so was clearly aware of it. Applicant could have analyzed the area identified by the Department or could have argued that some other area was appropriate but failed to do so.

Finding of Fact No. 11 is supported by the record and will not be changed.

**Applicant's Exception to Finding of Fact No. 14**

Applicant argues that the Applicant will use less than 330.24 acre-feet of water to achieve his beneficial purposes. This argument

does not conflict with the finding. Applicant has not presented evidence that a specific volume of water is needed.

Finding of Fact No. 14 will not be changed.

### **Conclusion of Law No. 3**

#### **Exceptions**

Applicant's arguments related to the lack of proof of adverse effect have been addressed previously. The Hearing Examiner correctly concluded that the Applicant did not prove by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. This conclusion is supported by the findings cited.

#### **Other**

The Hearing Examiner erroneously cited a contested case on page 14, lines 5 and 6 of the proposal for decision. The correct citation is In The Matter Of Application To Change A Water Right No. 41I 30002512 By Brewer Land Co, LLC, Proposal for Decision (2003). Conclusion of Law No. 3 will be modified to correct this error.

### **Conclusion of Law No. 5**

Applicant agreed to limit the use of water to no more than 330.24 acre-feet per year. (See Applicant's exceptions to Finding of Fact No. 14 and Conclusion of Law No. 3.) Conclusion of Law No. 5 will be modified to reflect Applicant's agreement.

The Proposal for Decision referred to Applicant's failure to prove that the quantity of water proposed to be used is the "reasonable amount, or the minimum amount, necessary for the proposed beneficial use." The law only requires an applicant to prove that the quantity is the reasonable amount, not the minimum amount needed for the proposed use without waste. (See Bitterroot River Protective Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003); and In The Matter Of The Application For

Beneficial Water Use Permit Numbers 76H-106450, 76H-106451, 76H-106452, 76H-106454, by Kenneth F. and Judith A. Siebel, Final Order (2002).)

Conclusion of Law No. 5 will be changed to correct this error.

**Applicant's Exception to Conclusion of Law No. 10**

Applicant argues all of the applicable statutory criteria were met by a preponderance of the evidence.

Applicant did not prove all of the applicable statutory criteria. (See Conclusion of Law No. 3)

Conclusion of Law No. 10 will not be modified.

**ORDER**

Therefore, the Department of Natural Resources and Conservation hereby adopts and incorporates by reference, with the modifications noted below, the Findings of Fact and Conclusions of Law in the Proposal for Decision in this matter:

1. On page 14, lines 5 and 6, strike "In the Matter of" on line 5 through "Vermedahl" on line 6. Insert "In The Matter Of Application To Change A Water Right No. 41I 30002512 By Brewer Land Co, LLC, Proposal for Decision (2003)".
2. On pages 14 and 15, strike Conclusion of Law No. 5 and insert the following:  
"5. The Applicant has proven by a preponderance of evidence that the quantity of water proposed to be used is the reasonable amount necessary for the proposed beneficial use. Diversion of water to anything but a beneficial use is a waste of water that is prohibited by law. Mont. Code Ann. §§ 85-2-102(2)(a), 85-2-102(19), 85-2-114, and 85-2-301. See Finding of Fact No. 14.

The Department may approve a change, subject to a condition that it considers necessary to satisfy the criteria of Mont. Code Ann. §

85-2-402. Mont. Code Ann. §§ 85-2-102(2)(a) Furthermore, the Hearing Examiner may take notice of generally recognized technical or scientific facts within the Department's specialized knowledge. (Mont Admin. Rule 36.12.221(4))

This criterion will be satisfied if the Applicant is authorized to divert no more than 330.24 acre-feet per year. See Finding of Fact No. 14. The Applicant has agreed to a condition limiting diversion of water to no more than 330.24 acre-feet per year. (See Applicant's Exceptions to Proposal for Decision in this matter.)"

Based on the record in this matter, the Department makes the following order:


Application To Change a Water Right No. 40M-30005660 is hereby **DENIED.**

#### **NOTICE**

The Department's Final Order may be appealed by a party in accordance with the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the appropriate court within 30 days after service of the order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department for preparation of and payment for the written transcript. If no request is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 10<sup>th</sup> day of January, 2005.



Jack Stults, Administrator  
Water Resources Division  
Department of Natural Resources and Conservation  
PO Box 201601  
Helena, MT 59620-1601


## CERTIFICATE OF SERVICE

This certifies that a true and correct copy of Final Order was served upon all parties listed below on this 10<sup>th</sup> day of January 2005, by first class United States mail.

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